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Lignite Coal: A Mineral under Mississippi Law

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LIGNITE COAL: A "MINERAL" UNDER MISSISSIPPI LAW?

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I. INTRODUCTION

The use of lignite for the production of energy is by no means a new phenomenon. In the recent history of the United States, both coal and lignite were the primary sources of fuel used in the generation of electricity, manufacturing and for heating purposes, and fossil fuels represent eighty five percent of the energy consumption in the United States. The use of coal and lignite as a fuel source began to decline as natural gas became the favored source of fuel for production of energy. Natural gas is typically considered to be a more efficient source of energy than coal,[2] and its movement is less costly. However, interest in lignite as a source of energy has renewed considerably as the United States withstands the tempestuous oil and gas markets[3] and finds itself beholden to foreign sources of fossil fuels, both friend and foe, at an increasingly alarming rate. Only in recent years has the ownership and mining of lignite become relevant again in Mississippi.

Current interests in greener, more environmentally friendly sources of energy to combat the effect of greenhouse gases make the use of lignite a double edged sword. While the coal burning power plants of yester year

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2. Lignite has less than 8,300 British Thermal Units (BTU) per ton. A standard unit of measurement used to denote both the amount of heat energy in fuels and the ability of appliances and air conditioning systems to produce heating or cooling. A BTU is the amount of heat required to increase the temperature of a pint of water (which weighs exactly 16 ounces) by one degree Fahrenheit.

3. According to the U.S. Department of Energy, Brent crude prices peaked at $143.95/bbl on July 3, 2008. Energy Information Administration, "Official Energy Information Statistics from the U.S. Government: Spot Prices," http://tonto.eia.doe.gov/dnav/pet/pet_pri_spt_s1_d.htm (last visited Apr. 13, 2009). On February 26, 2009 Brent crude closed at $43.18/bbl. The Henry Hub spot price for natural gas averaged $5.40 per Mcf in January, 2009, $0.60 per Mcf below the average December spot price. For all of 2008, the Henry Hub spot price averaged $9.13 per Mcf. Energy Information Administration, Short-Term Energy Outlook," http://www.eia.doe.gov/emeu/steo/pub/contents.html (last visited Apr. 13, 2009).

have been vilified for their harmful emissions, the newer "clean coal" technology represents the possibility of reducing harmful emissions and decreasing our dependence on foreign sources of energy.

You may ask what any of this has to do with whether lignite/coal is considered a "mineral" under Mississippi law. With renewed interest in the mining of lignite in Mississippi, questions concerning lignite ownership are inevitable.

Lignite can be characterized as coal in its juvenile state, and ranks below subbituminous coal. Lignite is commonly used for the production of electricity throughout the U.S. and at the present time, in 2009, is being mined in Mississippi. The Mississippi Lignite Mining Company ("MLMC") began mining lignite in Mississippi in 2000 to supply fuel to the mine mouth power plant, the Red Hills Power Project ("RHPP").[4] The RHPP in Choctaw County, Mississippi is the genesis of a Tennessee Valley Authority initiative seeking options for additional power generation. The generation facility has a net output of 440 megawatts of electricity.[5] The mine will supply the generation facility with 3.3 to 3.6 million tones of lignite per year through 2030.[6] Over the 30-year life of the 5,809-acre mine, about 4,700 acres of land will be disturbed: 1,400 acres by mine development activities, and 3,300 by lignite removal operations. The remaining 1,109 acres will be used for buffer zones.[7]

Construction of the mine began in September 1998 with construction of access roads, mine support facilities, a lignite handling facility, temporary stream diversions, a storm-water runoff control pond, and sedimentation control ponds.[8] Actual lignite mining began in 2000, and the power plant began generating energy on February 28, 2002.[9]

Recently, another power generation company filed for a certificate of public convenience and necessity with the Mississippi Public Service Commission to build a new power plant in Kemper County, Mississippi, also

4. *Annual Evaluation Summary Report for the Regulatory Program Administered by the State of MISSISSIPPI for Evaluation Year 2007 July 1, 2006 to June 30, 2007, Office of Surface Mining Reclamation and Enforcement.* Office of Surface Mining Reclamation and Enforcement, *Annual Evaluation Summary Report for the Regulatory Program Administered by the State of Mississippi for Evaluation Year 2007: July 1, 2006 to June 30, 2007* (2007).

5. Suez Energy Generation GA, "Red Hills Power Plant," http://www.suezenergyna.com/utilities/documents/Red%20Hills.pdf (last accessed Apr. 13, 2009).

6. *Annual Evaluation Summary Report for the Regulatory Program Administered by the State of MISSISSIPPI for Evaluation Year 2007 July 1, 2006 to June 30, 2007, Office of Surface Mining Reclamation and Enforcement.* Office of Surface Mining Reclamation and Enforcement, *Annual Evaluation Summary Report for the Regulatory Program Administered by the State of Mississippi for Evaluation Year 2007: July 1, 2006 to June 30, 2007* (2007).

7. *Id.*

8. *Id.*

9. *Id.*

fueled by lignite.[10] The new mine mouth power plant will be a coal gasification plant constructed with carbon capture capabilities.[11] The sequestered CO_2 can be used in secondary and tertiary recovery operations for oilfields in the latter stages of production.[12] The proposed design and technology represents more environmentally friendly options than traditional lignite fired power plants by substantially reducing emissions.

"Mississippi lignite resources equal about 13 percent of the total U.S. lignite resources of 40 billion tons. For the foreseeable future, lignite will primarily be used for the generation of electricity."[13]

With what appears to be a renewed interest in lignite/coal, Mississippi's approach to the ownership of these resources also has renewed importance. If faced with deciding whether certain reservations of "all minerals" includes lignite/coal, the decision reached by our courts may have repercussions nationally as well as locally if oil and gas prices again begin to trend upward and Americans are forced to look to alternate sources for their energy needs.

The debated reservations will likely stem from deeds dating back as far as the 1920s and 1930s. This is partly due to the fact that thousands of Mississippi farmers in the late 1920s and early 1930s were unable to pay the loans on their farms. Most of these loans in Mississippi were secured by the Federal Land Bank. In 1933, almost 68% of all Federal Land Bank loans were delinquent.[14] The bank foreclosed on these loans, and made conveyances of these lands. In the interest of its own solvency, the bank began reserving one half of the minerals on these lands it obtained through foreclosures.[15] In *Federal Land Bank of New Orleans v. Cooper*,[16] the Mississippi Supreme Court upheld the authority of the Federal Land Bank to make these reservations. It is this type deed, and related reservation, that is the subject of this article. So, the question becomes, when interpreting one of these deeds containing an "all minerals" type reservation, would Mississippi courts hold that the reservation includes lignite/coal?

This is an issue of first impression in Mississippi, so let us start with a brief background of the term "mineral," which is most typically defined as follows:

> 1. A naturally occurring inorganic element or compound having an orderly internal structure and characteristic chemical composition, crystal form, and physical properties.

10. Jennifer Jacob Brown, *Anthony Topazi: Cleaner Coal in Kemper County*, Meridian Star, December 22, 2008, available at /www.meridianstar.com/archivesearch/local_story_357004807.html (last accessed Apr. 13, 2009).

11. *Id.*

12. *Id.*

13. Office of Surface Mining Reclamation and Enforcement, Annual Evaluation Summary Report for the Regulatory Program Administered by the Birmingham Field Office of Mississippi (2006).

14. *Statement Regarding The Policy Of The Federal Land Bank of New Orleans With Respect To The Reservation Of Minerals In Connection With Sales Of Farms Acquired Through Foreclosure.*

15. *Id.*

16. 200 So. 729 (Miss. 1941).

> 2. In miner's phraseology, ore.
>
> 3. See: mineral species; mineral series; mineral group,
>
> 4. Any natural resource extracted from the earth for human use; e.g., ores, salts, coal, or petroleum.
>
> 5. In flotation, valuable mineral constituents of ore as opposed to gangue minerals.
>
> 6. Any inorganic plant or animal nutrient.
>
> 7. Any member of the mineral kingdom as opposed to the animal and plant kingdoms.[17]

Similar to the above textbook definition, the Mining and Minerals Policy Act of 1970 defines "mineral" as follows:

> "For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium."[18]

Both of these industry definitions are important because they include not only coal, but also petroleum and natural gas, which are both argued by some to be outside of the strict earth science definition of "mineral." However, it is well-settled in this state that the term "minerals" includes oil, gas and other hydrocarbons.[19]

When discussing how Mississippi may interpret a reservation of "all minerals" and whether lignite/coal would be included in such reservation, it is prudent to look to other jurisdictions for guidance. Below, we have briefly outlined decisions from other jurisdictions, including Alabama, Louisiana, North Dakota and Texas, which have all addressed this issue. As you will see, there is contradiction between the jurisdictions, and conflict even within the same jurisdiction on this issue. You will see from the following cases that it is hardly a well- settled issue in any state. Texas, for example, which Mississippi typically looks to for guidance in the area of oil and gas law, has likely done the most damage in bringing closure to this issue and has been harshly criticized for creating title uncertainties regarding near surface minerals and their ownership.

A. Alabama

Coal is mined in significant amounts in Alabama, and the law appears to be well settled that a reservation of "all minerals" is not ambiguous.[20]

17. Dictionary of Mining, Mineral and Related Terms (United States Bureau of Mines, 1996) (emphasis added), http://webharvest.gov/peth04/20041015011634/imcg.wr.usgs.gov/dmmrt/ (last visited April 9, 2009).

18. 30 U.S.C. 21(a) (West. 2009)

19. Singer v. Tatum, 171 So. 2d 134, 142 (Miss. 1965); Cole v. McDonald, 109 So. 2d 628, 630-31 (Miss. 1959).

20. Cantley v. Hubbard, 623 So. 2d 1079, 1082 (Ala. 1993).

The Alabama Supreme Court adopted a definition of minerals long ago that encompassed coal, but its broad definition of a mineral has since been eroded by subsequent decisions.[21] Alabama courts recognized that "[t]here is no general definition in the cases of the term 'mineral,' and in determining what is included within a reservation or grant of minerals, it is commonly stated that the meaning of the term is to be ascertained from the language of the instrument and the surrounding circumstances evidencing the intention of the parties."[22] But Alabama courts appear to trend toward findings that the words in a mineral reservation or grant should be given their plain meaning. In *Cantley v. Hubbard,*[23] the reservation in question reserved "all minerals," and despite an erroneous recitation of a prior reservation in the chain of title, the court found that this did not create any ambiguity and the reservation encompassed methane gas.[24] The *Hubbard* court cited to *Turner v. Lassiter,*[25] for the proposition that: " 'All' is all. 'All' is not ambiguous. 'All' is not vague. 'All' is not of doubtful meaning."[26]

The following year, the Alabama Supreme Court again noted that when construing the terms of a deed, the court's goal is "to ascertain the intent of the parties . . . the court must give effect to the plain and clear meaning of the language in the deed."[27] The court's ruling in *Phillips v. Harris* found coal was encompassed in a reservation of "the mineral rights."[28] The coal rights were expressly reserved by the United States on a portion of the land. The land was subsequently conveyed to another party, and the deed in question expressly provided that certain lands were being conveyed "less and except the coal rights reserved by the United States."[29] The deed also conveyed certain lands that did not contain the coal reservation by the United States with the following reservation: "less and except the mineral rights which are not intended to be conveyed."[30] The court found no ambiguity in the deed and construed the two separate mineral exceptions together to hold that the grantor simply owned all of the minerals on the entire property, except for the coal that is found on the portion of land that was previously reserved to the United States.[31] The court's

21. McCombs v. Stephenson, 44 So. 867 (1907); *see* W.S. Newell, Inc. v. Randall, 373 So.2d 1068, 1069 (Ala. 1979) (holding that "sand, gravel, and clay are not ordinarily considered minerals unless a contrary contention is manifested or unless the substance has some special value"); Payne v. Hoover, 486 So. 2d 426, 428 (Ala. 1986) (holding that limestone is not a mineral under reservation of "all mineral rights.").

22. *W.S. Newell, Inc.,* 373 So.2d at 1069 (citing U.S. ex rel Tennessee Valley Authority v. Harris, 115 F.2d 343 (5th Cir. 1940)).

23. 623 So. 2d 1079.

24. *Id.* at 1082.

25. 484 So. 2d 378 (Ala. 1985).

26. *Id.*

27. Phillips v. Harris, 643 So. 2d 974, 976 (Ala. 1994).

28. *Id.*

29. *Id.* at 975.

30. *Id.* at 976.

31. *Id.*

opinion makes clear that an "all minerals" reservation encompasses coal on the lands not burdened with the reservation to the United States.

As the above cases demonstrate, Alabama courts recognize that coal is included in a general reservation of "all minerals" and the term minerals should be given its plain meaning. The parties' intent should be examined only if the conveyance should contain some ambiguity.

B. Louisiana

Louisiana's coal reserves consist of an estimated 1.0 billion tons of lignite, located primarily in the northwestern part of Louisiana. Lignite was recognized in Louisiana as early as 1812.[32] Louisiana lignite was first used at the Confederate arsenal near Shreveport during the Civil War, and by the late nineteenth century, Louisiana lignite was commonly used by blacksmiths, steamboats, and railroads.[33] The first permitted surface coal mine in Louisiana began production in 1985 to supply lignite to the associated mine-mouth power plant.[34] An additional surface mine began producing lignite four years later, supplying lignite to the same power plant.[35]

Louisiana looks to the intent of the contracting parties to determine whether a broad reservation of minerals encompasses lignite, and while the Louisiana Supreme Court has held that a reservation of "all minerals" encompasses lignite, it has conversely held a reservation of "oil, gas and other minerals" does not encompass the right to strip mine lignite.

In *River Rouge Minerals, Inc. v. Energy Resources of Minnesota*,[36] the Louisiana Supreme Court ruled that a form oil and gas lease conveying the rights to "all other minerals," did not include the right to strip mine for lignite.[37] The court reasoned that the entire lease form was directed to the production of the oil and gas and referenced the many lease provisions specifically devoted to the production of oil and gas.[38] The court focused on the physical aspects of oil, gas, and lignite and held that the grant in *River Rouge* was the right to explore for and produce "minerals of the same physical properties as oil and gas, i.e. those that produced in liquid or gaseous form by drilling wells . . .[l]ignite coal is not included in the

32. *Lignite Resources in Louisiana*, Louisiana Geological Survery, Public Information Series No. 5, June 2000.

33. *Annual Evaluation Summary Report for the Regulatory Program Administered by the State of Louisiana for Evaluation Year 2006 July 1, 2005 to June 30, 2006,* Office of Surface Mining Reclamation and Enforcement.

34. *Lignite Resources in Louisiana*, Louisiana Geological Survery, Public Information Series No. 5, June 2000.

35. *Annual Evaluation Summary Report for the Regulatory Program Administered by the State of Louisiana for Evaluation Year 2006 July 1, 2005 to June 30, 2006,* Office of Surface Mining Reclamation and Enforcement.

36. 331 So. 2d 878 (La. Ct. App. 1976).

37. *Id.*

38. *Id.* (the various lease provisions contemplate the construction and burial of pipelines, maintenance of the lease by drilling or paying delay rentals; drilling and reworking wells; pooling and unitization; and the abandonment of wells.)

grant."[39] This appears to be a distinguishable situation from a deed reservation as this was interpreting "all other minerals" as it appeared in a standard oil and gas lease form. When the court was faced with deciding a reservation under a deed, the outcome was different.

Five years later, in a ruling that seemingly contradicts its holding in *River Rouge*, the Louisiana Supreme Court ruled that the seller's reservation of "all mineral rights" included the right to strip mine lignite under the subject property.[40]The case involved a conveyance of over 90,000 acres of timberland after two years of negotiation.[41] The buyer subsequently sought to clarify its rights to strip mine lignite on the property.[42] Although the court affirmatively stated that the reservation was not ambiguous, it also took great pains to examine the intent of the parties when they negotiated the sale.[43]

The court examined various factors to determine the intent of the parties.[44] It considered that strip mining the land would render the land unusable for its intended purpose (timber production).[45] However, the court noted that the buyer and seller had specifically negotiated the reservation of minerals, and contract negotiations took over two years.[46] Evidence was adduced at trial that the seller had consciously refused to purchase the mineral rights during negotiations.[47] The court wrote that the buyer would be held to their decision to "surrender claim to those rights."[48] Additionally, during the negotiations, the seller refused to allow the broad reservation to be limited by the buyer when the question of removal of sand and gravel was raised.[49]

The court dismissed the buyer's argument that the broad reservation did not include the right to strip mine lignite because it had no economic value in 1956 when the sale was negotiated, and its exploitation was not contemplated by either party.[50] The court found that mineral exploitation and exploration by its very nature is uncertain, "and the fact that a particular mineral has no foreseeable economic value at the time a mineral reservation is made is but one factor to be weighed."[51]

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39. *Id.* at 882.

40. Continental Group, Inc. v. Allison, 404 So. 2d 428 (La. 1981) (rev'd on other grounds).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 432.

46. *Continental Group, Inc.*, 404 So. 2d at 430-31.

47. *Id.* at 430.

48. *Id.* at 431.

49. *Id.* at 431.

50. *Id.* at 429.

51. *Id.* at 432. Though one commenter has pointed out that this is contrary to accepted Louisiana jurisprudence "that a substance must be commercially exploitable at the time of the agreement for it to be deemed included in a broadly worded grant or reservation of mineral rights." Mark A. Lowe, *Louisiana Lignite— A Lumberman's Lament: Continental Group, Inc. v. Allison,* 42 La. L. Rev. 1148, 1157 (1982).

Finally, the court seemed particularly persuaded by the inclusion of a damage clause providing that the seller would pay for all damages resulting from the exploitation of minerals from the land.[52]

After extensive treatment of the parties' intentions, the court stated simply that "the language employed in the mineral reservation is not ambiguous."[53] The words 'all minerals' clearly encompass solid minerals such as lignite."[54] The court's statement regarding the lack of ambiguity is contrary to the lengthy analysis and extensive treatment of the parties' intentions.

C. North Dakota

The single largest deposit of lignite known in the world is located in western North Dakota containing an estimated 351 billion tons. Lignite mining in North Dakota dates back to 1873, and by 1900, over 70 mines were operating in the state.

Of all of the cases discussing this issue from numerous jurisdictions, one of the most analytical approaches used in any case comes from North Dakota.[55] In *Christman,* the Federal Land Bank of St. Paul, through foreclosure, acquired title to certain lands in North Dakota in 1940.[56] On October 22, 1943, the Federal Land Bank conveyed the lands to Emineth subject to the following reservation:

> Excepting and reserving to the party of the first part and its successors and assigns fifty percent of all right and title and into any and all oil, gas and other minerals in or under the forgoing described land with such easement for ingress, egress and use of surface as may be incidental or necessary to use of such rights.[57]

This case is instructive because it construes another mineral reservation from the Federal Land Bank nearly identical to the reservation used in Federal Land Bank deeds for thousands of acres in Mississippi. Emineth's successor alleged that lignite was not a mineral within the meaning of "other minerals" in the reservation. The trial court held that the word "mineral" contained in the exception of the 1943 deed should be construed in its ordinary and popular sense to include lignite. Interestingly, the North Dakota Supreme Court held that the issue of whether lignite coal is a mineral was a question of law, not fact, relying on *Abbey v. State.*[58]

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52. *Continental Group, Inc.*, 404 So. 2d at 432.

53. *Id.* at 431.

54. *Id.* at 432.

55. Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973); Aff'd in Olson v. Dillerud, 226 N.W.2d 363 (N.D. 1975).

56. *Id.* at 546.

57. *Id.* at 547.

58. 202 N.W. 2d 844 at 874-75 (N.D. 1972).

The court next cited its 1946 holding in *Adams County v. Smith*[59], which held that lignite was considered a mineral for purposes of a statute requiring that all transfers of land by any county reserve fifty percent (50%) of all oil, natural gas, and minerals.[60] The court rejected arguments that coal is not similar to oil and gas because it is a hard mineral, fixed and confined to one place, while oil and gas are liquid and migratory in nature. The court observed that there are as many, if not more similarities between coal and oil and gas as there are dissimilarities, therefore the rule of "*ejusdem generis*" [61] cannot be applied to exclude coal from the term "other minerals" without a clear manifestation of the intent of the draftsman. Again, we see a court stating that lignite is a mineral as a matter of law; however, in the same opinion, the court will consider such facts as related to the intent of the parties.

The court addressed the argument that the parties did not intend to allow the grantor to completely destroy the surface and consequently its agricultural value by strip mining the coal. In making this determination, the court stated that "resources must be had to all of the terms of the instrument, to the character of the land and of the minerals, and, in cases of ambiguities, to extrinsic evidence of the surrounding circumstances and other facts throwing light on the intention of the parties."[62] In examining the terms of the deed, the court noted that as a general rule, a grant of minerals gives the owner of the minerals the incidental right of entering, occupying and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals.[63] This is consistent with Mississippi law.[64]

The court observed that the language in this case is "clear, unambiguous and without limitation. It severs the minerals from the surface of the land, retaining in the grantor the right to enter and use the surface for any purpose reasonably necessary to the use of its mineral rights. His rights are a fee simple estate in the minerals 'in or under' the land in question."[65] Thus, the court concluded that it was reasonable to assume that the parties intended for the grantor to use the surface to whatever extent reasonably necessary to remove fifty percent of "all oil, gas and other minerals."[66]

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59. 23 N.W. 2d 873 (N.D. 1946).

60. *Id.* at 875. See also *Abbey v State*, 202 N.W. 2d 844, where the North Dakota court construed the language of another statute requiring "fifty percent of all oil, natural gas, or minerals" to be reserved to the state, to include coal. Note also the 1959 case of *Salzseider v. Brunsdle*, 94 N.W. 2d 502 (N.D. 1959) where the court construed similar statutory language and noted that "purely organic substances as oil, gas and coal, are . . . regarded as minerals."

61. "A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY, 535 (7th ed. 1999).

62. *Christman,* 212 N.W.2d at 550 (citing 1 A.L.R.2d 787, 789).

63. *Id.* (citing 58 C.J.S. MINES AND MINERALS §159 (b), pp. 332-333).

64. *See* Union Producing Co. v. Pitmman, 146 So. 2d 553 (Miss. 1962); EOG Resources v. Turner, 908 So. 2d 848 (Miss. Ct. App. 2005).

65. *Christman*, 212 N.W.2d at 550 (citing Northwestern Imp. Co. v. Morton County, 78 N.D. 29, 47 N.W.2d 543, 550 (1951)).

66. *Id.*

Although the court pronounced lignite a mineral as a matter of law, they examined the surrounding circumstances to determine the intent of the parties. The means of removal that would have been within contemplation of the parties could be resolved by looking at evidence from the North Dakota legislative research committee in its 1955 report noting that official records showed that coal had been mined in North Dakota since at least 1884. Prior to 1920, coal was mined almost exclusively by the underground methods. Since that time, there has been a steady trend toward the use of strip mining methods, and such trend progressed until 1953 when the last large underground coal mine was closed. Thus, the court agreed that at the time in question (1) coal was widely known to exist in the area, (2) it was reasonable to assume that the parties to the deed in question knew the existence of lignite in the area, (3) strip mining was the best method of removing the coal, and (4) the parties intended this instrument to reserve fifty percent of all lignite.

The court disposed of the argument that agricultural use of the land in question would be destroyed by strip mining, noting that the legislature had adopted laws providing for the reclamation of strip mined lands, similar to Mississippi's Surface Coal Reclamation Act.[67] The court found that strip mining and reclamation would result in restoration of surfaces temporarily disrupted.

Finally, the court took note that the instrument read "all oil, gas and other minerals," and that meant "*all* oil, *all* gas, and *all* other minerals." The court concluded that the words "all oil, gas and other minerals" were meant to include and do include lignite.

A couple of years after the *Christman* case was decided, the court found that a reservation of "all the oil, gas, casinghead gas, casinghead gasoline and other minerals" did not encompass coal.[68] The ruling was based on a statute in effect at the time of the conveyance which provided as follows:

> [N]o lease or conveyance of mineral rights or royalties separate from the surface rights in real property . . . shall be construed to grant or convey to the grantee thereof any interest in and to any gravel, coal, clay or uranium unless the intent to convey such interest is specifically and separately set forth in the instrument of lease or conveyance.[69]

North Dakota appears to err on the side of including lignite/coal in these types of "mineral" reservations unless there is a specific intent (and/or statute) to the contrary. It is also important to note that the *Christman* court acknowledged a reclamation plan to discount any arguments that the

67. *See* Surface Mining and Reclamation Act, MISS. CODE ANN. §53-7-1 *et seq.*

68. Reiss v. Rummel, 232 N.W.2d 40, 42 (N.D. 1975).

69. *Id.* at 43 (citing N.D. CENT. CODE § 47-10-24 (1943)).

surface owner would lose the use of his land. Mississippi's reclamation act was adopted in 1977.

D. Texas

The near-surface coal deposits (200 feet) in Texas are roughly 97 percent lignite, with the remainder as bituminous coal. The potential coal reserves are 23 billion tons of lignite and 787 million tons of bituminous coal. In the 1840's the first bituminous coal was mined along the Trinity River of Texas. As early as 1850, lignite was produced and used. Coal from both lignite and bituminous deposits was used by the railroads until the 1920's. In 1917, coal production in Texas was about 2.5 million tons, with approximately equal amounts of lignite and bituminous coal. From 1918 until 1950, only 18,000 tons of lignite were produced, but in 1954, a lignite-fueled electric power-generating plant near Rockdale, Texas opened. Following that, annual coal production increased rapidly to meet the demand for electric power generation at additional plants. In 2005, over 46.2 million tons of lignite and bituminous coal were produced in Texas making Texas the fifth ranked coal-producing state and the largest lignite producer in the world.

The issue of whether lignite/coal is a "mineral" may have been most strenuously litigated in Texas, and the confusing results from the Texas courts are alarming. We address this because on issues of first impression in oil and gas law, the Mississippi courts often look to Texas jurisprudence for guidance.[70] Important to note and remember while reading the following Texas decisions is whether these decisions would be considered "sound" in Mississippi.

Until the early 1970s, Texas followed an "ordinary and natural meaning test" to determine whether the phrase "other minerals" in a grant or reservation clause covered substances other than oil or gas. Yet similar to other jurisdictions, Texas also considered surface destruction as a factor in deciding such questions.[71]

Then, in 1971, the Texas Supreme Court held that iron ore was not a mineral within the terms of a 1941 reservation of "an undivided 1/2 interest in and to all of the oil, gas and other minerals in and under, and that may be produced from" a tract of land.[72] The iron ore underlay the land, and finding that the ore must be mined by open-pit or strip mining methods, the court held as follows:

70. Williamson v. Elf Acquitaine, 925 F.Supp. 1163, 1167 (N.D.Miss. 1996) (Mississippi has general policy of adopting Texas law in cases involving previously unaddressed oil and gas issues when satisfied with the soundness of the reasoning.); *See also* Phillips Petroleum Co. v. Millette, 72 So. 2d 176, 182 (Miss. 1954).

71. *See* Heinatz v. Allen, 217 S.W.2d 994, 998 (Tex. 1949).

72. Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971).

> The parties to a mineral lease or deed usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts. This estate is dominant, of course, and its owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired. Unless the contrary intention is affirmatively and fairly expressed, therefore, a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate.[73]

The court found nothing in the deed to suggest that the parties intended to vest in the grantee the right to destroy the surface, stating that under these circumstances, iron ore, like gravel and limestone, should be considered as a part of the surface estate and not as a part of the mineral estate.

Acker was followed by an appellate court decision in *Williford v. Spies*.[74] The *Williford* court addressed whether a reservation of "oil, gas and other minerals" included title to lignite coal that was to be excavated by strip-mining methods. Relying on *Acker* the court determined that lignite belonged to the surface estate since the parties to the conveyance could not have intended to define minerals as a substance which had to be removed by methods that would destroy the surface estate. Unlike the North Dakota decision, this court found it immaterial that the surface could be reclaimed by proper methods and restored.

The surface destruction test was actually announced by the court around 1977 in *Reed I* and *Reed II*.[75] The test depends upon evidence found outside of the four corners of the mineral record to determine the intent of the parties to the severance,[76] and considers whether there is any reasonable method of developing the mineral that would not consume, destroy or deplete the surface.[77] "This requires a two-step factual determination of the substance's proximity to the surface and the reasonable methods available for extraction. Ownership is determined as a matter of fact, rather than by the court as a matter of law."[78] And, in *Reed II*, the court

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73. *Id.* at 352.

74. 530 S.W.2d 127 (Tex.Civ.App.-Waco 1975)

75. Reed v. Wylie, 554 S.W. 2d 169 (Tex. 1977) ("Reed I"); Reed v. Wylie, 597 S.W. 2d 743 (Tex. 1980) ("Reed II").

76. Acker v. Guinn, 464 S.W. 2d 348, 352 (Tex. 1971).

77. Plainsman Trading Co. v. Crews, 898 S.W. 2d 786, 790 (Tex. 1995).

78. Peter Hosey, Title to Uranium and Other Minerals (Still Crazy After all these Years), Volume 33, Number 2, 67, December 2008, State Bar of Texas, Oil, Gas and Energy Law Section Report.

held that any deposit that "is within 200 feet of the surface is 'near surface' as a matter of law."[79]

Then, just a few years later in 1983, the Texas Supreme Court abandoned the *Acker* and *Reed* decisions to determine ownership of near surface minerals, and without overruling those cases, held that "title to a substance which we have determined to be a mineral is held by the owner of the mineral estate as a matter of law."[80] In *Moser,* the surface owner brought an action to quiet title to uranium. The Texas Supreme Court abandoned the surface destruction test and redefined minerals as "all substances within the ordinary and natural meaning of that word, whether their presence or value is known at the time of severance."[81] In an effort to preserve the stability of title for certain minerals, the court affirmed its previous decisions that certain substances belong to the surface estate as a matter of law,[82] and the court ruled that near surface coal and lignite belong to the surface estate as a matter of law.[83] The court also limited the ordinary and natural meaning test to future transactions in an effort to preserve conveyances made in reliance on *Acker* and *Reed II.*[84]

In *Acker* and *Reed II,* the court relied upon the surface destruction test. The *Moser* court determined that conveyances made prior to the decision were made in reliance on this test. Consequently, limiting the application of *Moser's* ordinary and natural meaning test to prospective transactions (those made after June 8, 1983) would not prejudice the rights of parties in pre-*Moser* transactions which relied on the surface destruction test of *Acker* and *Reed II.*[85] Moreover, the Texas courts have continued to recognize the surface destruction test in subsequent opinions following *Moser* that concern near surface lignite, iron and coal.[86] By later applying a surface destruction test after *Moser,* the court has contradicted itself by adhering to *Reed II* after acknowledging that the surface destruction test caused title uncertainty.[87]

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79. *Reed II,* 597 S.W.2d at 748.

80. Moser v. United States Steel Corp.,676 S.W.2d 99, 101 (Tex. 1984).

81. *Id.* at 102.

82. *Id.* (citing Heinatz v. Allen, 217 S.W.2d 994 (Tex. 1949)).

83. *Id.* at 101 (citing Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (Reed II) (near surface lignite, iron, or coal not included in "other minerals" if any reasonable method of production would damage surface)); Heinatz v. Allen, 217 S.W.2d 994, 997 (1949) (limestone and building stone not included in devise of "mineral rights")).

84. *Moser,* 676 S.W. 2d at 103.

85. Kelli McDonald, A Reservation of the Minerals by the State of Texas Includes Coal and Lignite Even Though Recovery Will Destroy or Deplete the Surface Estate Schwarz v. State, 703 S.W.2d 187 (Tex. 1986), 28 S. Tex. L. Rev. 727, 737 (1987).

86. Schwarz v. State, 28 Tex. Supp. Ct. Ct. J. 488, 489 (June 12, 1985); Holland v. Kiper, 696 S.W.2d 588, 591 (Tex. App.—Tyler 1984, writ ref'd n.r.e).

87. *See* David Scott, Comment, Determining Mineral Ownership in Texas after Moser v. United States Steel Corp.—The Surface Destruction Nightmare Continues, 17 ST. MARY'S L.J. 185, 211 (1985) (advocating total abandonment of surface destruction test and application of *Moser* to all severances of minerals in Texas).

So, where is Texas after all of this? It appears that Texas does apply an ordinary and natural meaning test to determine what a "mineral" is; however, because the courts did not overrule the *Acker* and *Reed* decisions, near surface coal and lignite belong to the surface owner, regardless of their natural meaning.[88]

Based on cases from the surrounding jurisdictions, the only thing we can be sure of is that we can not be sure what Mississippi would do when determining whether lignite/coal is a "mineral" under a reservation of "all minerals." But Mississippi would likely apply any one or combination of the following "tests:"

> 1. Ordinary and Natural Meaning: A true application of this test would only examine whether the substance at issue constitutes a mineral by determining whether knowledgeable individuals ordinarily and naturally consider the substance a mineral according to common recognition or general understanding. A good example of a true application of this test was outlined in *Cantley v. Hubbard* which held that "All is all. All is not ambiguous. All is not vague. All is not of doubtful meaning."[89]
>
> 2. Manner of Enjoyment: As advocated by Professor Kuntz: "the intention sought should be the general intent rather than any supposed but unexpressed specific intent, and, further, that general intent should be arrived at, not by defining and redefining the terms used, but by considering the purposes of the grant or reservation in terms of manner of enjoyment intended in the ensuing interest."[90] According to Professor Kuntz, "the manner of the enjoyment of the mineral estate is through extraction of valuable substances, and the enjoyment of the surface is through retention of such substances as are necessary for the use of the surface."[91]
>
> 3. Surrounding Circumstances: This test examines a variety of extrinsic evidence to determine questions such as: was the substance commonly recognized as a mineral in the area at the time the reservation was made; what was the business position of the parties; was there any existing production at the time the reservation was made; was there any development on the property at issue; did the newspapers or other public circulations advise of the existence of the particular mineral?

88. Holland v. Kiper, 696 S.W.2d 588 (Tex. App. 1984) (reservation of minerals did not include lignite found at a depth of less than 200 feet from the surface.)

89. 623 So. 2d 1079, 1082 (Ala. 1993). (citing Turner v. Lassiter, 484 So. 2d 378, 380 (Ala. 1985).

90. Eugene O. Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 Wyo. L.J. 107, 112. (1948)

91. *Id.*

> 4. Surface Destruction: This test excludes all substances removed by methods that would destroy or deplete the surface estate. This test has been applied in Texas, abandoned in Texas, and subsequently applied again in Texas, and as a result, it has been harshly criticized as creating title uncertainties. Not only does this test pose problems in application today, but as new advances in technology allow hydrocarbons such as lignite to be mined without complete surface destruction, these problems are compounded. Consider the following scenario: in 1977, the grantor of a parcel of land does not own the lignite under the reservation of "all minerals" because extraction would result in destruction of the surface. Yet, under the same reservation of "all minerals" in 2030, the grantor may now hold title to the lignite due to advances in technology, extraction and reclamation, creating better ways to remove the mineral without complete surface destruction. There can be no good test that would allow for mineral ownership under the same reservation to be determined differently depending on the day!

By examining the cases from other jurisdictions, and narrowing down the main "tests" that have been applied in those jurisdictions, it is time to take a look into Mississippi.

E. Mississippi

The question of whether lignite/coal is a mineral under a reservation of "all minerals" has never been answered in Mississippi. But since 1954, the Mississippi Supreme Court has, on several occasions, ruled on the question of whether a reservation of "minerals" encompassed a particular substance. In those cases, our court has stated that the word "mineral" has no definite and certain meaning that can be attributed to it in all cases, and thus the most reasonable rule is that each case must be decided upon the language of the grant or reservation, the surrounding circumstances and the intention of the grantor if it can be ascertained.[92] It is well settled in our State that the general rules of construction, which are applicable to deeds and contracts, are also applicable to documents reserving a mineral interest.[93]

In *Moss v. Jourdan*,[94] which was later overruled by *Witherspoon v. Campbell*,[95] the Mississippi Supreme Court considered whether gravel was a "mineral" when the conveyance contained the following reservation:

92. *See* Cole v. McDonald, 109 So.2d 628, 635 (Miss. 1959) (holding bentonite a "mineral" under a reservation of "oil and gas or other minerals"); Singer v. Tatum, 171 So. 2d 134, 145 (Miss. 1965) (holding salt, sulphur and all minerals were covered under a reservation of "mineral rights reserved").

93. Oldham v. Fortner, 74 So.2d 824 (Miss. 1954).

94. 92 So. 689 (Miss. 1922).

95. 69 So. 2d 384 (Miss. 1954).

> It is hereby understood and agreed by the said J. W. Coman, party of the second part, that the said H. T. Moss and James A. Moss, parties of the first part, shall have and own all minerals that may be on the above described land.[96]

Two issues addressed by the court were (1) does Moss own the gravel and (2) if he does own the gravel, does he have the right to remove it if the removal will destroy the surface of the land?[97] With almost no discussion, the court held that Moss did in fact own the gravel based on the language of the reservation, finding that "it is manifest from the face of the deed that the grantors intended thereby, and the legal effect of the language they employed is, to convey the land described therein except all minerals that may be therein or thereon."[98] The court, without resorting to extrinsic evidence, insinuated that "minerals" was unambiguous, and as a matter of law, encompassed gravel.

The second question addressed by the court was whether Moss had the right to remove the gravel. The court first cited the following rule:

> Where one person owns the surface of the land and another the mineral thereon, the owner of the mineral may remove it from the land, but in so doing, he must allow sufficient of the subjacent land to remain to support the surface in its natural state.[99]

By applying a "surface destruction test" to determine whether the owner of a mineral could extract his mineral, the court held that if "the mineral cannot be removed without destroying the surface, the owner of the mineral, in the absence of an agreement to the contrary, is without the right to remove it."[100] In this instance, Moss owned the gravel but was without the right to remove it.[101] The *Jourdan* court considered the issue of surface destruction, *but not for the purposes of determining the ownership of the mineral,* only for determining whether the mineral owner could remove his mineral. This appears to be an early recognition of what was developed in other jurisdictions as the accommodation doctrine.[102]

Thirty two years after this holding, *Moss v. Jourdan*[103] was overruled by *Witherspoon v. Campbell.*[104] Campbell conveyed to Witherspoon "the

96. *Moss,* 92 So. at 690.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 691.
101. This holding was before and is now contrary to the holding in Union Producing Co. v. Pittman, 146 So. 2d 553, 555 (Miss. 1962) ("the right to remove minerals by the usual and customary method of mining exists, even though the surface of the ground may be wholly destroyed as a result thereof").
102. However, the recent case of EOG Resources v. Turner, 908 So. 2d 848, 856, n.4 (Miss. App. 2005), held that a mineral owner in Mississippi is not bound by the accommodation doctrine.
103. *Moss,* 92 So. 689.
104. 69 So. 2d 384 (Miss. 1954).

surface rights and all timber" in 240 acres in Yazoo County, reserving "all minerals now owned by me of every kind and nature, both liquid and solid, with the right of ingress and egress, and all necessary rights for the exploration and development of the same . . ."[105] Witherspoon farmed the land and later contracted to sell the gravel from the land for highway construction.[106] Five years after the original conveyance, Campbell sought to enjoin Witherspoon from selling the gravel by claiming to own it under the original deed.[107] The trial court enjoined Witherspoon from selling, disposing of or removing the gravel from the land.[108]

The Mississippi Supreme Court reversed the trial court and found in favor of Witherspoon, declaring him the owner of the gravel.

> It seems to be well settled in most jurisdictions that in determining the meaning of a conveyance or reservation of minerals, regard may be had not only of the language of the deed, but also the situation of the parties, the business in which they were engaged and the substance of the transaction . . .It also seems to be generally recognized that the word "minerals" has no definite meaning and certain meaning that can be attributed to it in all cases.[109]

The court looked at a variety of extrinsic evidence to determine the "surrounding circumstances" of the parties.

> Considering the situation of the parties in the instant case, the business in which they were engaged and the substance of the transaction, it should be stated that the grantor was not engaged in construction work of any kind that would render of any use to her the strata of gravel which underlaid this tract of land, and that any attempt on her part to utilize the same would result in the destruction or great impairment of the surface rights which she was conveying to the grantee in the deed of the land to him for farming purposes, and that since the first oil field in this state had been discovered in the county where this land is situated, five years prior the execution of this deed of conveyance, the custom in the county where the deed was to operate was necessarily that of dealing in minerals as being oil, gas and other like minerals as distinguished from sand and gravel where no specific mention of the latter is made in a conveyance, and that since the grantor was likewise the attorney who prepared both the original and the correction deed which made

105. *Id.* at 385.
106. *Id.*
107. *Id.*
108. *Id.* at 386.
109. *Id.*

> no specific mention of sand and gravel, the conveyance should be construed most strongly against her, after the exclusion of incompetent oral testimony at the trial in regard to the alleged conversations had between the grantor and the grantee as tow hat was to be included in the deed.[110]

The court stated that it was overruling *Moss v. Jourdan* but then qualified the holding by arguably limiting *Jourdan* to conveyances that occurred before "the changed conditions brought about by the discovery of oil and gas in this state."[111]

> We have, therefore, concluded that the case of *Moss v. Jourdan* . . .should be and the same is hereby expressly overruled, and that the rule of property thereby established should not be applied to any conveyances or reservations of 'minerals' that were executed under the changed conditions brought about by the discovery of oil and gas in this state, since to apply such rule to those conveyances or reservations would be manifestly contrary to the intention of the parties to such conveyances or reservations in the absence of a specific designation of sand and gravel as being intended to be conveyed or reserved.[112]

Without expressly adopting a "surface destruction test," the court basically applied it to the facts of the case. In this instance, it was used to determine ownership as distinguished from *Jourdan* where it was used solely to determine whether the mineral could be extracted.

In 1959, five years after *Witherspoon*, bentonite was included as a "mineral" in a reservation of "oil, gas and other minerals. . ."[113] The deed at issue in this case was executed as part of a partnership dissolution between Cole, Bradley and Young, wherein Cole was to be conveyed partnership assets and land, and each partner reserved a 1/3 interest in oil, gas and other minerals.[114]

Cole later filed suit seeking a confirmation that he owned all bentonite in the lands arguing that bentonite was not an oil, gas or other mineral of like kind and character, and therefore, it was excluded from the reservation and conveyed to him.[115] The trial court confirmed title in Cole to the surface but held that each partner owned a 1/3 interest in the bentonite under the mineral reservation.[116]

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110. *Witherspoon*, 69 So. 2d at 386 .
111. *Id.* at 389.
112. *Id.*
113. Cole v. McDonald, 109 So. 2d 628 (Miss. 1959).
114. *Id.* at 629.
115. *Id.*
116. *Id.*

The court then distinguished *Cole* from *Witherspoon* by noting that the land in *Witherspoon* was completely underlain with gravel and removing it would have destroyed the surface entirely.[117] In looking at surrounding circumstances, the court also noted that unlike *Witherspoon*, oil and gas were not the only substances that had been discovered in the county.[118] During the period, several newspaper articles referenced and called public attention to the discovery of bentonite in Monroe County.[119] Thus, the court concluded that the parties intended to be vested with a 1/3 interest in oil, gas or other minerals of any kind or character.[120] The court refused to apply the doctrine of *ejusdem generis* to limit the scope of minerals reserved by Young and Bradley.[121]

Next, in a confusing opinion written by the court in 1965, the reservation "mineral rights reserved" was held to be ambiguous.[122] In *Singer*, the Hibernia Bank executed a deed to Tatum and under each tract description the words "mineral rights reserved" appeared.[123] In addition, the following reservation was also included in the deed:

> THE GRANTOR HEREIN reserves unto itself, its agents or assigns, the oil, mineral, gas, and petroleum, on, in, or beneath all the lands herein conveyed . . .The grantor on behalf of itself, its agents or assigns, hereby reserve the usual and customary rights of ingress and egress, over, across, and upon said lands so situated . . .for the purpose of mining, boring, or making other explorations thereon and removing there from such oil, mineral, gas and petroleum, as may be found.[124]

In 1962, Tatum brought suit to confirm title to salt, sulphur and other minerals, and argued that only oil, gas and other hydrocarbons were reserved in Hibernia. The court's opinion is confusing because it first stated that the issue presented was a "question of law and not of fact"[125] (which appears to be consistent with *Witherspoon* and *Cole*) but then stated that the reservations of "oil, minerals, gas and petroleum" and "mineral rights reserved" were ambiguous and that all evidence regarding the surrounding circumstances would be considered to ascertain the intent of the parties. The court ruled that Hibernia intended to reserve all of the minerals. Again, the court distinguished this case from *Witherspoon* recognizing that in the latter case, the extraction of gravel would have destroyed the surface of the land.

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117. *Id.* at 635.
118. *Id.* at 636.
119. *Cole*, 109 So. 2d at 636.
120. *Id.*
121. *Id.* at 637.
122. Singer v. Tatum, 171 So. 2d 134 (Miss. 1965).
123. *Id.* at 137.
124. *Id.*
125. *Id.* at 141.

In light of the *EOG v. Turner* decision from 2005,[126] it is also hard to believe that Mississippi would revert back to any type of surface owner accommodation doctrine. In *Turner*, the surface owners filed a lawsuit alleging that EOG failed to accommodate their surface interests. Among other things, the surface owners complained of the location of an access road and its effect on a proposed cabin that they were planning to build. The chancellor found in favor of the surface owners and against EOG (for an amount less than $100,000) and held that EOG's well site and access road limited the surface owners' use of their property and changed the nature of their property.

In reversing the chancery court, the Mississippi Supreme Court reiterated the following points of law:

> 1. "[A] mineral owner or a lessee of the mineral estate, in the absence of additional rights expressly conveyed or reserved, may use as much of the surface as is reasonably necessary to exercise its right to recover minerals, without liability for surface damage."[127]
>
> 2. The right to use a reasonable amount of the surface for mineral exploration and operations "enures to the mineral estate in the absence of surface leases or other agreements expressly granting the mineral owner rights to use the surface of the lands."[128]

The court specifically stated that the chancellor erred by holding EOG to a duty to ensure that "the property owners are properly compensated for the use and damages that result from said exploration activities." According to a bold statement by the court, "this is not the law."

> Clearly, EOG had the right to damage as much of the surface . . . as was reasonably necessary to its oil and gas operations and had no obligation to compensate the Turners for surface damage in the absence of negligence or its use of more land than was reasonably necessary to conduct its operations.[129]

Finding that there was no duty on the part of EOG to accommodate the surface owners in the absence of negligence or unreasonable use of the lands, the court reversed and found in favor EOG.

What would Mississippi do if faced with the issue of determining the ownership of lignite? As stated earlier in this article, on issues of first impression in oil and gas law, the Mississippi courts often look to Texas law

126. *EOG Resources*, 908 So. 2d 848.
127. *Id.* at 854 (citing *Union Production Co. v. Pittman*, 146 So. 2d 553, 555 (Miss. 1962)).
128. *Id.* (citing *Reynolds v. Amerada Hess Corp.*, 778 So. 2d 759, 762 (Miss. 2000)).
129. *Id.* (citing *Union Production*, 146 So. 2d at 555).

for guidance.[130] However, with no great consistency, guidance or soundness from the Texas courts, it is unlikely that the Mississippi courts would adopt the piecemeal remedy to questions of mineral title adopted by the Texas courts.

Perhaps the best approach of insuring title certainties in Mississippi is to follow some type of natural meaning test. For example, if the reservation on its face is not ambiguous, decide as a matter of law, without resorting to extrinsic evidence, whether a particular substance constitutes a mineral. As Professor Kuntz advanced, in deeds similar to those executed by the Federal Land Bank in the 1920s and 1930s, it is likely that the parties had no real intent at all to sever any specific substance, but instead, intended to separate the surface estate from the mineral estate. And, the law in Mississippi until 1954, as expressed in *Jourdan,* was that the term "mineral" was unambiguous and would have included lignite/coal.

However, with the ruling from *Witherspoon,* and with the other rulings from Texas, Mississippi may fall into the same trap and look to extrinsic evidence to determine the intent of the parties at the time the deed was executed.[131] This type of analysis leaves the Mississippi title examiner in the precarious position of divining the intent of parties to transactions sometimes over a century ago. Undoubtedly, inequities will exist if either method is adopted. Stability of title is paramount to the efficient exploitation of Mississippi's mineral resources. The inability of a party to determine whether it possesses the rights to a given substance may hamper efforts to explore and ultimately exploit the State's mineral wealth. Presumptive mineral owners should not be forced to seek a determination whether a particular substance is considered a mineral in a particular community, county or region of the state. This type of approach is likely to lead to a fragmented and disjointed body of law and stifle economic activity.

130. Williamson v. Elf Acquitaine, 925 F.Supp. at 1167 ("there is a general policy of adopting Texas law in cases involving previously unaddressed oil and gas issues depending of course on 'the soundness of the reasoning by which they are supported'.) *See also,* Phillips Petroleum Co. v. Millette, 72 So. 2d 176, 182 (Miss. 1954).

131. *Cole,* 109 So. 2d 628.